Supreme Court, U.S.
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No. 99-216

IN THE

Supreme Court of the United States

CHARLES AMATI, *et al.*,

Petitioners,

v.

CITY OF WOODSTOCK, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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I. Respondents Fail To Address Petitioners' Issues On Appeal, And Instead, Misrepresent And Mischaracterize Both The Petition And The Facts Of The Case.

Respondents' Brief is materially unresponsive and interjects issues and matters not raised in the Petition for Writ of Certiorari (hereinafter "Petition"). Respondents mischaracterize the true issues before the Court, and after doing so, construct arguments to overcome the altered issues they themselves have raised. First they stand the straw man up, then they knock him down. At the same time, Respondents ignore important issues actually contained in the Petition. Most significantly, Respondents make serious factual misrepresentations to the Court, which are devoid of any support in the record. Petitioners herein base their entitlement to Judgment as a Matter of Law (hereinafter "JMOL") upon the uncontested facts contained in the record.

A. Personal Calls Were Allowed On 7799

For the first time, on appeal to the Supreme Court, Respondents now claim that employees were actually prohibited from making personal calls on the 7799 line. There is absolutely no evidence in the record to support such a contention. Instead, the record is replete with evidence that employees were told, trained, and otherwise encouraged to use 7799 to make their personal calls. For example, in December of 1982, William Patrick, Chief of the Woodstock Police Department, published unequivocal notice to all police department employees telling them:

> As you know, all the telephone lines are taped with the exception of 338-7799. The line was intentionally left untaped to allow for personal calls, however, we request that you keep those calls brief and to a minimum. This policy will take effect immediately and be strictly adhered to.

(Trial Exhibit 70).

Later, in 1985, Respondent Herbert Pitzman, then Chief of the Woodstock City Police Department, published the "Woodstock City Police Department Dispatch and Records Procedure Manual." The Manual, which was used to train telecommunications and records personnel, stated:

> 338-7799 calls will be answered with a simply [sic] greeting. (Unlisted number designated for Police Personnel's personal calls. Untaped line.)

(Trial Exhibit. #93).

In stark contrast to Respondents' sudden and novel proposition that personal calls were prohibited on 7799, Respondent Beu, former assistant chief, testified at trial that employees were allowed to make personal calls on any phone line within the police department. (Tr. 2020-2021). There was a policy statement expressly allowing personal phone calls on 7799 and employees were trained to use the line for their personal calls. Express notice was initially given that 7799 was intentionally left untaped for the designated purpose of allowing for personal calls. Thereafter, Respondent Pitzman authorized, approved, and published the training manual to Petitioners; Respondents cannot be heard to disavow its contents.

Respondents next assert that the Petition misrepresents the nature of the 7799 line as being dedicated exclusively for personal use by employees. However, Petitioners do not contended the 7799 line was limited solely to personal use. Rather, the evidence proved that making and receiving personal phone calls was a permitted use of 7799, and that Respondents directed, trained, and encouraged employees to make their personal calls on 7799 under the pretext that the line was unrecorded.

B. Miscellaneous Unresponsive Issues

Respondents deny actively misleading Petitioners into believing that 7799 was untaped. However, Petitioners rely on Respondents' "intentional" interception as the only motive

necessary to state a cause of action under the Federal Wiretap Act (hereinafter "FWA"). Whether the Respondents had an additional "secret" motive to record Petitioners' personal phone calls is irrelevant because Respondents admit they "intentionally" recorded, listened to, and used the contents of Petitioners' personal conversations without Petitioners' knowledge or consent.

Respondents admit they gave no notice to the Petitioners that 7799 was being recorded. Remarkably, the Seventh Circuit found that it was sufficient that one or more Petitioners "may have known" of the recording. A "may have known" standard is no standard at all and is patently unreasonable. Furthermore, evidence that one Petitioner may have learned earlier than another that 7799 was being recorded is immaterial where, as here, the knowledge, if any, didn't accrue to any Petitioner until months after illegal recording occurred.

Still, Respondents suggest that Petitioners had no expectation of privacy in the 7799 line, that notice of recording was posted, and that Petitioners could have discovered the taping. First, there is no statutory requirement of an expectation of privacy in wire communications. 18 U.S.C. § 2511(1)(a); *Simpson v. Simpson*, 490 F.2d 803, 809 n.15 (5th Cir. 1974). Respondents also conveniently leave out the fact that their so-called posted notice of recording excluded reference to 7799 entirely. Finally, the FWA does not legitimize unlawful wiretapping simply because the wiretap victim failed to discover the tortious conduct. Not getting caught committing illegal conduct is not the equivalent of committing lawful conduct. Although Respondents minimize Petitioners' privacy interest in their personal calls, this Court acknowledged that the protection of privacy was an overriding Congressional concern in the adoption of Title III. *Gelbard v. United States*, 408 U.S. 41, 92 S. Ct. 2357, 2361 (1972).

Finally, Respondents hypothesize that the Petitioners' real contention is with the propriety of the jury instructions. However, whether jury instructions were proper does not resolve the improper denial of JMOL, the true issue on appeal. The jury instructions serve only to demonstrate the District Court's misunderstanding of the required elements for a violation of § 2511(1)(a) of the FWA, a misunderstanding that predicated the trial court's wrongful denial of JMOL.

Respondents' focus on the jury verdict ignores the fact that the case should never have gone to the jury in the first place. Instead, based on the uncontested facts, the District Court should have granted Petitioners' Motion for JMOL. Likewise, but for an improper departure from Federal Wiretap Act jurisprudence by the Court below, the Seventh Circuit should have entered Judgment as a Matter of Law on appeal.

II. Respondents Are Not Entitled To The Law Enforcement Exemption.

The Seventh Circuit should have granted the law enforcement exemption only after satisfaction of the three-factor analysis used by the consensus of Federal courts. The Court below should have factually analyzed the quantum of notice that 7799 was wiretapped, whether there was a legitimate purpose for the wiretap, and the character of the intercepted conversations. (Citations in Petition for Writ of Certiorari, pp. 9-10). The need for a factual analysis was particularly evident here, where express notice was provided to the contrary, informing the line's users that 7799 was untaped.

Respondents admit they gave no notice whatsoever to inform users that the 7799 line was recorded, they neither sought nor received Petitioners' consent to record, and they concede they made no attempt to rectify the general belief that 7799 was untaped. Under the majority analysis, consideration of Respondents' entitlement to the law enforcement exemption would end here. Also, contrary to Respondents' thinking,

Petitioners do not contend that express notice is required for the law enforcement exemption to apply. But, where express notice is provided that a phone line is untaped, subsequent taping cannot be legitimized by an unsupported finding of fact that recording all calls to and from a police department is a routine, hence ordinary, hence exempt police practice.

The evidence clearly showed that the 7799 line was unrecorded for a decade, that Respondent Pitzman and Beu's private phone lines were always unrecorded, and that numerous other local police departments maintained private telephone lines at their police departments too. (Trial Exhibit 91). Given this evidentiary background, the Seventh Circuit's finding of fact that it is routine, hence ordinary, to record *all* calls to and from a police department, was against the manifest weight of the evidence. Moreover, their conclusion of law was built upon their erroneous finding of fact, that a law enforcement officer's recording of all phone lines at a police station is exempt from the FWA. Because the resulting rule of law was built upon a false predicate, it cannot stand.

Title III prohibits the utilization of wiretapping and bugging by all public officials where there is no compelling law enforcement need. S. Rep. No. 1097, *reprinted in* 2 U.S. Code Cong. & Admin. News 1968, 90th Cong., 2d Sess., at p. 2264. However, Respondents admit there was no investigative or police purpose served by recording the Petitioners' personal conversations on 7799. Consequently, their conduct is prohibited by Title III.

The purpose of the FWA was to prohibit all interceptions of oral and wire communications, except those provided for in the FWA; there is a clear statutory intent for wiretapping to be used with restraint. *United States v. Giordano*, 416 U.S. 505, 514-515, 94 S. Ct. 1820 (1974). Nonetheless, Respondents suggest that *Giordano* should not be followed when interpreting the law enforcement exemption. Although they admit that

Giordano prohibits indiscriminate tape recording in order to obtain evidence against targeted individuals, Respondents urge that *Giordano*'s prohibitions should not be applied where indiscriminate recording occurs first and individuals are targeted afterward. The Respondents' theory poses an unacceptable risk of pretextual eavesdropping.

The Woodstock Police Department intercepted and taped months of personal and/or privileged calls. The evidence showed that while Respondents were recording 7799, the line was also being used by arrested persons to call their attorneys. Recordings also captured confidential informants talking to their police contacts and calls between employees and their spouses. The evidence also proved that Respondents recorded and listened to calls concerning union matters. The FWA imposes an affirmative duty not to intercept personal or privileged calls using a wiretap. (Citations in Petition for Writ of Certiorari, p. 15). Respondents ignored that duty. Not only were personal calls recorded, they were listened to by the Respondents, and their contents were used by Respondents as a basis to reprimand employees. Respondents' use of the contents of personal conversations on 7799 ultimately led to Petitioners' discovery of the taping.

A. Premises-Based Exemption From FWA Liability

The opinion below construes the law enforcement exemption in terms of "premises-based immunity." The Seventh Circuit replaces the three-factor majority analysis with a wholesale "premises-based" exemption. The opinion below grants the law enforcement exemption to the recording of any phone call to or from a police department, regardless of notice, regardless of content, and regardless of the motive for recording the calls.

The Seventh Circuit found that it is routine and hence ordinary for all calls to and from a police station to be taped. (App. A Petition for Writ of Certiorari, p. 6a). The court found

further that taping all such calls falls within the ordinary course of law enforcement. *Id.* However, the Seventh Circuit's conclusion that it is routine to record all calls to and from a police station is against the manifest weight of the evidence. Trial evidence established that both Respondents, Pitzman and Beu, kept separate unrecorded telephone lines in their offices at the police department, that were available for their exclusive use. Obviously, it was not routine to record *all* calls to and from the Woodstock police station.

III. The Seventh Circuit's Holding That "Title III Does Not Allow For Suits Against Municipalities" Was A Substantive Ruling Going Directly To An Issue On Appeal.

On appeal to the Seventh Circuit, the Petitioners raised the issue of the District Court's dismissal of the City of Woodstock as a defendant under the FWA claims. The opinion below affirmed Woodstock's dismissal, finding that Title III does not allow for suits against municipalities. (App. A Petition for Writ of Certiorari, p. 7a). This holding was not dicta, as Respondents contend; it was a dispositive ruling on a substantive issue on appeal. The fact that the Seventh Circuit provided no citation for its proposition does not render the ruling "dicta". The need for Supreme Court review of this issue is apparent from the division among the Circuits whether a municipality is a proper defendant under Title III.

A. The Privacy Act of 1986 Authorized Municipal Liability Under Title III

Respondents contend that the term "person" under § 2511(1) excludes governmental entities. If this were 1968, Respondents would be correct. However, Congressional intent evolved between 1968 and 1986. The clear legislative intent of the sweeping amendments brought about in the Privacy Act of 1986 was to bring governmental entities, including municipalities, within the ambit of the statute's protections.

See Tucker v. Waddell, 83 F.3d 688 (4th Cir. 1996). The logical catalyst for this change was the Supreme Court's decision in *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978). *Monell* changed the tenor of Congressional thinking and established a mechanism to visit liability directly upon a municipality where the injury results from the policy of the municipality. *Id.* In *Davis v. Zirkelbach*, 149 F.3d 614 (7th Cir. 1998), *cert. denied*, 119 S. Ct. 902, the Seventh Circuit correctly employed a *Monell* analysis to establish municipal liability under the FWA.

The District Court improperly dismissed the City of Woodstock whose policy-makers ordered the taping of the Petitioners' private calls. On appeal, the Seventh Circuit affirmed holding that a municipal entity could not be sued under Title III. This finding flatly conflicts with express congressional intent for Title III to apply to governmental entities. S. Rep. No. 99-541, 99th Cong. 2d Sess., *reprinted in* U.S. Code Cong. & Admin. News, 3555, 3597; H.R. Rep. No. 647, 99th Cong., 2d Sess. 74 (1986).

Respondents contend that *Zirkelbach*, *supra*, did not establish municipal liability for a violation of the FWA. However, the *Zirkelbach* Court, citing to *Monell*, stated unequivocally that the same principles of respondeat superior that govern entity liability under Sec. 1983 should be applied to the Federal Wiretap Act. *Zirkelbach*, 149 F.3d 614, 621 (7th Cir. 1998).

Although not cited in the Petition, Respondents distinguish *Organizacion J.D. Letda v. United States Department of Justice*, 18 F.3d 91 (2nd Cir. 1994), *cert. denied*, 512 U.S. 1207, on the basis that the Court only found that civil liability existed for governmental incursions into stored electronic communications under § 2707 of Title III. Respondents' acknowledgment of municipal liability under Title III in *Organizacion J.D. Ledta*, is curious, given their reliance upon the Seventh Circuit's edict

that municipalities cannot be sued under Title III. It is inconsistent to argue that governmental entity liability exists under § 2707 for the interception of stored electronic communications such as e-mail, yet at the same time argue that no governmental liability attaches for interception of private telephonic conversations under § 2520. *See Tucker v. Waddell*, 83 F.3d 688 (4th Cir. 1996). The evil incident to invasion of the privacy of the telephone is far greater than that involved in tampering with the mails. *Olmstead v. United States*, 277 U.S. 438, 48 S. Ct. 564, 571 (1928) (Brandeis, J., dissenting).

B. Changes Brought About By The Privacy Act of 1986

Title III was amended by the Privacy Act of 1986. Congress amended the Federal Wiretap Act and introduced the Stored Wire Communications Act within the framework of the statute, using identical language in both Acts to allow for private civil actions against any "person or entity". Federal courts who have addressed this issue have noted that the term "entity" was intended to include municipalities since other provisions of Title III already allowed for private civil suits against any other type of defendant. *Tucker v. Waddell*, *supra*; *Dorris v Absher*, 959 F. Supp. 813, 820 (M.D. Tenn. 1997). The 1986 amendments implement Congress' overall purpose to strictly limit warrantless wiretapping by allowing private causes of action against violators of the Federal Wiretap Act.

CONCLUSION

The Supreme Court interpreted the Federal Wiretap Act in *United States v. Giordano*, 416 U.S. 505, 94 S. Ct. 1820 (1974), finding that Congress evinced a clear intent that statutory authority for wiretapping be used with restraint. *Id.* at 514-515. Wiretapping should not be a routine procedure and the exceptions should be read narrowly. *Id.* The Federal Wiretap Act should provide a prophylactic protection against warrantless wiretaps. *Id.* In the opinion below, the Seventh Circuit departed from the Supreme Court's teachings in *Giordano*, and gave broad effect to the law enforcement exemption.

The *Amati* court below fully immunized the routine recording of personal calls to and from all police departments, ignoring the fact in the instant case that the users of the line had been told for a decade that the line was untaped and were never advised otherwise. The court expanded the law enforcement exemption and in doing so provided blanket sanctuary to eavesdroppers at police stations. The Seventh Circuit went on to shield governmental entities entirely from any liability whatsoever under Title III. The Seventh Circuit's opinion pierced the prophylactic protections of the law.

In *Monell*, the Supreme Court outlined the mechanism to establish municipal liability for injuries caused by municipal policy. In *Zirkelbach*, the Seventh Circuit properly followed this Court's example in *Monell* and applied the same analysis to assess municipal liability under the Federal Wiretap Act. In *Amati* below, the court ignored the *Monell-Zirkelbach* analysis in favor of a standardless, premises-based exemption from FWA liability for police stations.

The opinion below found a prima facie violation of § 2511(1), but for an application of the law enforcement exemption. (App. A Petition for Writ of Certiorari, p. 2a). Absent misapplication of the law enforcement exemption, a prima facie violation of § 2511(1) would remain. Therefore, when a proper analysis is applied to Petitioners' case, the law enforcement exemption does not apply and a civil remedy is available to Petitioners under § 2520.

By granting the Petition for Writ of Certiorari this Supreme Court may resolve the division among the circuits over the proper analysis for application of the law enforcement exemption, harmonize the split among the circuits regarding municipal liability under the Federal Wiretap Act, and restore the integrity of the Federal Wiretap Act's protections.

Respectfully submitted,

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